Journal of Air Law and Commerce

Volume 14 | Issue 2 Article 8

1947

International

INTERNATIONAL

Department Editor: Richard Kermit Waldo*

PROVISIONAL INTERNATIONAL CIVIL AVIATION ORGANIZATION (PICAO)

I. Introduction

THE Interim Council held its Seventh Session during the first quarter of 1947, from January 7 to April 2. The Council's Air Transport and Air Navigation Committees met frequently during the session, and the Committee on the Convention convened for the first time, on February 3. Five technical divisions of the Air Navigation Committee met; and the fifth regional air navigation meeting was held, in Melbourne, Australia.

Highlighting the period was the announcement by the U.S. Department of State that the twenty-sixth instrument of ratification needed to bring the permanent convention into force had been deposited, and that the convention would become operative thirty days later, on April 4, 1947. By April 5, thirty-eight of the forty-nine member states of PICAO had deposited their instruments of ratification and were thus eligible to participate as voting members in the First Assembly of ICAO (International Civil Aviation Organization), the permanent body set up by the convention.

This Assembly will convene in Montreal, ICAO's permanent site, on May 6. Most of the Interim Council's time during the first quarter was taken up by preparatory work for the Assembly and in perfecting the structure of ICAO.

II. General Developments

A. *Preparations for Assembly*

After extended debate the Council decided that the First Assembly should be held in Montreal, rather than at a European site as several Member States desired. At the same time, it agreed to recommend to the Assembly that the 1948 Assembly be convened somewhere in Europe.

The Council approved the general detailed agenda for the forthcoming Assembly which envisages six commissions:

Commission 1. — Constitutional and General Policy Questions
Commission 2. — Technical Questions
Commission 3. — Economic Questions
Commission 4. — Legal Questions
Commission 5. — Administrative and Financial Questions
Commission 6. — Technical and Financial Aid through ICAO

Commission 1 will deal, among other things, with the draft relationship agreement between ICAO and the United Nations which is complicated by the UN Assembly's resolution calling upon ICAO to debar Franco Spain from membership. The commission will also consider the desirability of any amendments to the permanent convention.

*Special Assistant on PICAO Matters, Aviation Division, U. S. Department of State; Adviser, U. S. Delegation to the First Interim Assembly of PICAO, Montreal, May-June, 1946; Secretary of Subcommittee on PICAO Matters of the Interdepartmental Air Coordinating Committee, 1945-46. *Formerly*, Chief Research Sec., Aviation Div., Dept. of State; Air Transport Analyst for TWA, PAA, BEW and WPB, and Economic Analyst for Dept. of Commerce. Author of pioneer air cargo studies published in 1944-45 by Edward S. Evans Transportation Research. A.B., 1940 Univ. of Pennsylvania; graduate work in Transportation and International Organization at American Univ., 1944-47. EDITOR'S NOTE: Mr. Waldo has undertaken to edit this department in his personal capacity, rather than as an officer of the Department of State.

Commission 3's work will feature the consideration of the latest draft Multilateral Agreement on Commercial Rights in International Civil Air Transport.

Commission 4 will consider whether to recommend to the Assembly the convening of a special meeting of representatives of all states whether members of ICAO or not, to deal with the two draft conventions on its agenda, at which meeting such representatives would have full and equal rights of discussion and vote, or to proceed itself as a Commission of ICAO with consideration of the conventions. The draft conventions concern the Recording of Rights in Rem in Aircraft and the Legal Status of the Aircraft Commander,[1] respectively. The former is a revision of the draft Convention on Recordation of Title to Aircraft and Aircraft Mortgages drawn up at the First Interim Assembly of PICAO. It was prepared at a February meeting in Paris of a legal *ad hoc* committee convened by PICAO, which had at its disposal the comments of a number of Member States on the earlier draft Convention. The committee also revised the draft Convention on the Legal Status of the Aircraft Commander.

The Interim Council discussed the contentious problem of the revision of the Warsaw Convention and decided that it would be premature to attempt to secure agreement on a revised text at the coming Assembly. There is a widespread desire for further study and the Council accordingly confined its action to transmitting to Member States the documents prepared at CITEJA's recent Cairo meeting, and the comments thereon by various organizations.[2]

B. *Preparations for Permanent Organization*

During the first quarter of 1947 the Council and its two main Committees gave careful study to the structure of the analogous bodies that should be set up in the permanent Organization and arrived at a number of conclusions which will be submitted to ICAO in the form of recommendations. Among the more important of these were:

(a) That the Air Navigation and Air Transport Committees should be continued in their present form, with membership open to all Contracting States, for a period of one year after the coming into force of the Convention;

(b) That a Committee on International Law, on which all Contracting States will have the right to be represented, should be established: (i) to study, prepare and submit to the Council draft conventions leading progressively to the unification and codification of international air law, and (ii) to advise the Council on questions relating to international air law and on any other matter of a legal character referred to it by the Council;

(c) That Council Committees on Credentials, Finance, Personnel, Publications and Public Information, Accommodations and Legal Status, and Joint Support of Air Navigation Services be continued in the permanent Organization, the last named to have a larger membership than the others (9 as against 5) and Contracting States not represented thereon to be permitted to take part in its deliberations on invitation of the President of the Council;

(d) That the Presidency should retain its international character.

[1] For text of this draft convention as transmitted by CITEJA to PICAO see 14 JOURNAL OF AIR LAW AND COMMERCE 85 (1947).

[2] For text and comments on the latest draft revision of the Warsaw Convention (Beaumont draft of December 1946) see 14 JOURNAL OF AIR LAW AND COMMERCE 30, 37, 44 and 86 (1947).

C. *Relations with United Nations*

It will be recalled that the UN General Assembly, when it approved the ICAO-UN Relationship Agreement, did so upon the condition that ICAO would debar Franco Spain from membership. The Interim Council has discussed at length the implementation of the UN's decision. It has drafted an amendment to the permanent convention designed, upon its ratification by the required number of states, to exclude Franco Spain from membership. The draft amendment which the Assembly will be asked to approve, together with its preamble and implementing resolution is as follows:

PREAMBLE

WHEREAS, the General Assembly of the United Nations has recommended that the Franco Government of Spain be debarred from membership in specialized agencies established by or brought into relationship with the United Nations and from participation in conference or other activities which may be arranged by the United Nations or by these agencies until a new and acceptable government is formed in Spain, and

WHEREAS, the General Assembly, in approving the draft Agreement between the United Nations and ICAO, made it a condition of its approval that ICAO complies with any decision of the General Assembly regarding Franco Spain,

NOW, THEREFORE, the Assembly of ICAO, wishing to conform with the recommendation of the General Assembly and to comply with the condition of the General Assembly to its approval of the draft Agreement between the United Nations and ICAO hereby approves the following proposed amendment to the Convention on International Civil Aviation in accordance with Article 94 of the Convention:

AMENDMENT

Any State whose government shall be determined by the competent organ of the United Nations to be inimical or to constitute a potential threat to the maintenance of international peace and security shall thereby be debarred from membership in the Organization and from participation in its conferences and other activities or suspended from the exercise of the rights and privileges of a contracting State until such time as a government, acceptable to the competent organ of the United Nations shall have been formed. At such time the State concerned, if a contracting State shall, if it so desires, be restored to the exercise of the rights and privileges of a contracting State.

DRAFT RESOLUTION TO SUPPLEMENT AMENDMENT

WHEREAS, the Assembly has approved a proposed amendment to the Convention on International Civil Aviation permitting it to debar or suspend a State from the exercise of the rights and privileges of a contracting State under certain conditions, and

WHEREAS, the Preamble to the Resolution introducing the amendment clearly demonstrates that it was intended to apply to Spain under its present government and that some time will elapse until such amendment is ratified by the contracting States and during this time Spain will remain a member of ICAO,

NOW, THEREFORE, the Assembly declares its wish that the present Government of Spain, during the period until the amendment comes into force and appropriate action has been taken thereon by the Assembly not participate in this Assembly or in conferences and other activities which may be arranged by ICAO and instructs the Council to conduct its relations with the Government of Spain accordingly.

The situation was complicated by Franco Spain's deposit of her instrument of ratification of the convention on March 5, apparently indicating her intention to participate in ICAO despite the UN's action.

Meanwhile, informal cooperation on the working level has gone on between PICAO and UN. Experts from the two organizations are collaborating in the fields of statistics, public information and personnel administration. In this last field, preliminary steps have been taken looking towards the creation of an International Civil Service Commission.

III. Air Transport

A. *Multilateral Air Transport Agreement*

The work of the Air Transport Committee of PICAO was dominated during the first quarter of 1947 by consideration of the proposed multilateral agreement on commercial air rights. The Subcommittee which had been considering the matter reported on January 26. Thereafter the main committee debated the issues in a series of public meetings which ended on Febraury 26. The major point of difference was on the question of whether routes should be exchanged automatically between participating nations by the proposed agreement, or alternatively whether the agreement should simply lay down principles under which routes would be exchanged through separate arrangements. On a test vote on this issue which occurred on February 13, the automatic exchange of routes was favored by the Representatives of Brazil, Canada, Czechoslovakia, France, Netherlands and Norway, while the alternative was favored by the Representatives of China, the United Kingdom, and the United States.

The Interim Council of PICAO voted on March 4 to transmit the majority and minority proposals to the forthcoming Assembly of the aviation organization.[3] On that occasion, Major General Laurence S. Kuter, representing the United States, stated that the majority proposal was not satisfactory from the point of view of the United States and said that the U. S. Delegation to the First Assembly of ICAO would be prepared for full discussion. He expressed the hope that a just and sound agreement could be signed.

B. *International Air Mail Study*

The Air Transport Committee reviewed a comprehensive study of international air mail prepared by the secretariat. The study will be used in connection with the air mail agenda item under Commission 3 at the Assembly, and will provide the basis for possible recommendations to the Congress of the Universal Postal Union which will meet in Geneva in May. The study deals with the economic aspects of air mail and attempts to develop reasonable bases for fixing international air mail rates as well as payments to air carriers. The project is typical of the kind of useful cooperative work that is developing on subjects of mutual interest between specialized agencies in different fields.

IV. Air Navigation

A. *Divisional Meetings*

During the period under review, four Divisions of the Air Navigation Committee held their second sessions in Montreal, covering the fields of Personnel Licensing, Accident Investigation, Airworthiness and Operating Standards, while the Aeronautical Maps and Charts Division met for the third time.

Each Division made further improvements on the PICAO Recommendations for Standards, Practices and Procedures in their respective phases of air navigation. In addition, the Personnel Licensing group recommended, among other things, that a Medical Division be set up in the Secretariat. The Aeronautical Maps and Charts Division drew up a plan for allocating the production of charts on the basic 1: 1,000,000 scale among Member States, and it recommended that its next session be held in Europe. It is of interest to note that this would be the first divisional meeting to be held away from the Organization's headquarters at Montreal. The Accident

[3] For the Report of the Air Transport Committee, the text of the Draft Multilateral Agreement and the Commentary thereon, and the statement of minority views, see pages 235-53, *infra*.

Investigation Division sought to develop an efficient method whereby the Secretariat would circulate to Member States information concerning the results of accident investigations. The Airworthiness Division studied, among other items, the desirability of establishing technical conditions under which aircraft built in one State could be assured of certification as airworthy in another State. Important on the agenda of the Operating Standards Division was the standardization of altimeter settings for vertical separation of planes in flight.

B. *Regional Air Navigation Program*

The South Pacific Regional Air Navigation Meeting was held in Melbourne, Australia from February 4 to 20. Fifth in PICAO's series of ten regional meetings being held throughout the world, the Melbourne meeting dealt with the largest of the areas into which PICAO has divided the world. As in earlier meetings, the tailoring of PICAO's Recommendations for Standards, Practices and Procedures to the region in question was accomplished, and a regional facilities inventory made, with plans laid for the future.

PICAO opened its third regional office, in Cairo, for the Middle East area. Other offices are operating in Dublin (North Atlantic Region) and Paris (European-Mediterranean Region). Mexico City has been selected as the site of the Caribbean Regional office.

V. Joint Support Program

The Interim Council approved the general report on joint support policy prepared by a joint working group of the Air Navigation and Joint Support Committees of the Council. The report will be submitted to the ICAO Assembly as a recommended statement of policy for the Organization in carrying out the provisions of Chapter XV of the Chicago Convention.

In its present tentative form, the Council report sets forth in some detail the principles and procedures believed necessary in the field of joint support. Based on the articles contained in Chapter XV of the Convention, the report recommends the setting up of a unit in the ICAO secretariat through which requests for financial or technical aid from member states would be processed and the guiding principles under which each separate request would be handled.

Interim arrangements for the first concrete plans of financing an air navigation facility on an international basis were expected to be completed by early April. This pertains to the loran station located at Vik, Iceland. Apportionment of the financial burden involved has been set in proportion to the benefits expected to be derived from the continued operation of the station by each of the participating states. Those expected to contribute to the financing of the station, through the medium of PICAO, are Canada, France, Great Britain, the United States, the Netherlands and Iceland. Permanent arrangements for continued operation of the Vik station are being held in abeyance pending action by the conference of the International Telecommunication Union this spring on loran frequency assignments.

VI. Committee on the Convention

The Committee on the Convention on International Civil Aviation met for the first time, to consider whether any amendments of the Convention were desirable at this time. The committee concluded that it would be well to have no extensive amendments initiated by the First Assembly of ICAO, and that a general overhaul might more profitably be undertaken two years hence, at the Third Assembly, with the background of two years of operating experience. Accordingly the Committee reviewed and rejected proposals for early amendment of a number of articles.

Sole exception to the no-amendment policy adopted was the case of Article 94, the Convention's article dealing with amendments. The committee recommended that the First Assembly approve amendment of this article to speed up in the future the coming-into-force of amendments to provisions of the convention of a mere procedural character, or amendments merely involving clarification or editorial readjustment of the Convention's text. This would be done by omitting the requirement of ratification and permitting the Assembly itself to amend the convention, if a two-thirds vote of the Assembly decides the amendment does not involve new obligations on the part of the Contracting States.

VII. Program for Second Quarter of 1947

In addition to the ICAO Assembly meeting opening in Montreal on May 6, another European-Mediterranean Air Traffic Control Meeting will be held in Paris beginning April 15, and the South American Regional Air Navigation Meeting will convene in Lima, Peru on June 17.

R. K. W.

INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA)

I. Introduction

The first quarter of 1947 saw meetings of IATA's Legal, Technical and Traffic Committees as well as its Sub-Committees on Airworthiness; Aircraft Maintenance; and Aerodromes, Air Routes and Ground Aids; and the Warsaw Convention Sub-Committee of the IATA Executive Committee.

II. Legal Committee

The Legal Committee met at Montreal on March 21 to consider proposals for amendment and changes to a number of international conventions which will be considered at the forthcoming ICAO Assembly (see above). In addition, the meeting discussed an analysis of the International Sanitary Convention for Aerial Navigation, and examined a number of matters referred to the Legal Committee by other IATA Committees.

III. Warsaw Convention Sub-Committee

The Warsaw Convention Sub-Committee of the IATA Executive Committee, meeting at Montreal on March 24, examined the convention in detail in order to ascertain what amendments are most desirable from the point of view of IATA.

The Annual General Meeting of IATA at Cairo last November voted to recommend against any immediate change in the Convention, but directed the Association to make a study of what changes would be desirable in the light of operational experience now being obtained. The Sub-Committee will report its findings to the Executive Committee and it is probable that their recommendations will be further considered in a joint meeting with the International Chamber of Commerce and other interested organizations.

IV. Technical Committee

A substantial series of recommendations on Aircraft Maintenance Practices has been submitted on IATA's behalf to the PICAO Airworthiness and Operating Standards Divisions as the result of three IATA Technical Sub-Committee meetings at New York during February. The three groups which have helped frame these recommendations are the Sub-Committees on Airworthiness, Aircraft Maintenance and Aerodromes, Air Routes, and Ground Aids.

The meeting of the full IATA Technical Committee at Montreal on March 31 will act on preparations for a reorganization of its existing sub-

committees, and will draft plans for the 1947 IATA Technical Conference. This Conference, which has been postponed from an original date of April 15, will review the work of the various PICAO divisions during the preceding six months.

A full document outlining the results of long studies by a special IATA technical working group of civil aviation requirements in the high frequency spectrum is now being printed. It will be submitted to PICAO and to the May meeting of the International Telecommunication Union.

V. TRAFFIC COMMITTEE

The regular meeting of the full IATA Traffic Committee at Nice from March 4 to 8 requested, among other things, that the Director General ask PICAO to make its Recommendations for Facilitation of International Civil Aviation effective at the earliest possible moment. The committee urged that the recommendations should not be adopted in specific instances if they represent a retrograde step from regulations presently in force.

R. K. W.

INTERNATIONAL TECHNICAL COMMITTEE OF AERIAL LEGAL EXPERTS (CITEJA)

Since the last Plenary Session in Cairo, no further meetings of the CITEJA commissions or of the full committee have been held. The CITEJA at Cairo adopted a resolution providing that if the Chicago Civil Aviation Convention should be brought into force by the ratification or adherence of the required number of States so that the First Assembly of the International Civil Aviation Organization (ICAO) would be held in Montreal at an early date, the CITEJA would hold a plenary session in Montreal concurrently with that of the Assembly, so that CITEJA activities could be terminated and its functions turned over to the Committee on International Air Law of ICAO.

Since the Cairo Meeting, the United States Section and the Advisory Committee to the Section have held a number of meetings in Washington to discuss some of the CITEJA documents adopted at Cairo. These documents consisted of a report by the reporter for the First Commission of CITEJA on the proposed draft convention on aircraft mortgages and aircraft property record; the recommendations adopted by CITEJA on the subject; and the draft convention on the status of the aircraft commander, which was adopted by CITEJA at Cairo and transmitted to the PICAO for consideration by the next assembly of PICAO or its successor.

R. K. W.

MULTILATERAL AGREEMENT ON COMMERCIAL RIGHTS IN INTERNATIONAL CIVIL AIR TRANSPORT — PROCEEDINGS OF THE COMMITTEE ON AIR TRANSPORT (Submitted through the Interim Council) TO THE FIRST ASSEMBLY OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION*

REPORT OF THE COMMITTEE ON AIR TRANSPORT

INTRODUCTION

1. The First Interim Assembly of the Provisional International Civil Aviation Organization adopted the following three resolutions dealing with the desirability of a multilateral agreement on commercial rights in Interna-

* PICAO Doc. 2866, AT/169, 26/2/47.

tional Civil Air Transport and with the development of such an agreement (DOC. 1837 A/46, Appendix B):

Resolution IV

Resolved: That the First Interim Assembly affirms the opinion of its members that a multilateral agreement on commercial rights in international civil air transport constitutes the only solution compatible with the character of the International Civil Aviation Organization created at Chicago.

Resolution V

Whereas: The Assembly of the Provisional International Civil Aviation Organization desires to establish a program for the development of a multilateral agreement which will be acceptable to Member States as rapidly as is possible; and

Whereas: The Assembly is in accord that a final multilateral agreement on commercial rights should not be completed or presented for signature by the Member States present at this Assembly;

Now therefore be it resolved: That Commission Number 3 of this Assembly be directed to proceed immediately with a frank and open discussion of all of the problems involved in developing a multilateral agreement, so that the national points of view of the Member States may be made known with respect to all matters which may be the subject of such an agreement, and that in such discussions the Commission take into account the documentation now or hereafter before the Commission for its consideration; and further

Resolved: That the discussion resulting therefrom be incorporated into a document which would serve as a basis of further study by the Air Transport Committee of the Council for the purpose of developing a multilateral agreement, which will take into account such national points of view, for submission to the next annual Assembly; and further

Resolved: That each Member State be requested, during the coming year, to furnish to the Council for reference to the Air Transport Committee any additional views which it may have on the subject and the Council is requested to circulate such views and information as to progress to Member States during such period, to the end that the Air Transport Committee may present to the next annual Assembly a document which will embody the experience of nations with operations under existing or future agreements, that may be of benefit in developing a multilateral agreement.

Resolution XXVIII

Resolved: That the document resulting from the discussion of the problems involved in the development of a multilateral agreement on commercial rights in international civil air transport . . . . shall consist of:

(a) A verbatim transcript of the oral discussions on that subject which took place in Commission Number 3 during the current session of the Assembly, as edited and placed in the hands of the Secretariat on or before June 30th, 1946;
(b) Written comments of Member States submitted at the meetings of said Commission;
(c) Such further written comments as may be received from Member States on or before June 30th, 1946.

2. At the time of adopting the above resolutions, the Assembly had before it for consideration a document (DOC. 1577 AT/116, reissued for the purposes of the Assembly as DOC. 1632 EC/2), which had been prepared by the Air Transport Committee pursuant to the instruction contained in Article III, Section 6, paragraph 3 a (4) of the Interim Agreement on Interna-

tional Civil Aviation. The draft of multilateral agreement contained in that document was a basis for the discussion at the Interim Assembly, but met with several objections. It is not necessary to detail these objections here, since they are set forth in full in the records of the Assembly discussion (see the Assembly documentation generally and DOC. 2089 EC/57 hereinafter referred to), and since the Assembly approved the recommendation of its Commission No. 3 to the effect that a final multilateral agreement on commercial rights should not be completed or presented for signature by the Member States present at that Assembly.

RESUME OF WORK DONE SINCE THE FIRST INTERIM ASSEMBLY

3. In accordance with Resolution XXVIII, a printed document of some 200 pages (DOC. 2089 EC/57), containing all First Interim Assembly material relevant to the development of a multilateral agreement, was prepared by the Secretariat and despatched to Member States in October 1946.

4. At its meeting held 11 September 1946, the Air Transport Committee appointed a Sub-Committee which was instructed to be responsible for developing a further draft of a proposed multilateral agreement on Commercial Rights in International Civil Air Transport. This Sub-Committee had the following membership:

Mr. Anson C. McKim—Canada (Chairman)
Mr. T. Y. Yang—China
Mr. H. Bouché—France
Ali Fuad Bey—Iraq
Dr. F. H. Copes van Hasselt—Netherlands
Sir James Cotton—United Kingdom
Mr. Paul T. David—United States.

The Sub-Committee was instructed to begin its active work as soon as the results of the Assembly discussion (DOC. 2089 EC/57) were available on printed form.

5. The Sub-Committee held twenty-three meetings from 24 October 1946 to 22 January 1947. Attendance was not confined to its members; the President of the Interim Council and Representatives of various Member States participated in the discussions and contributed to the result.

6. On 26 January 1947, the Sub-Committee submitted to the Air Transport Committee its report (subsequently embodied in Part I of DOC. 2761 AT/163, under date of 10 February 1947); attached to the report, as Appendix A, was a draft Multilateral Agreement and, as Appendix B, a commentary on the Multilateral Agreement. The report was submitted on behalf of the Sub-Committee, the majority of which concurred with its views. Statements on behalf of members of the Sub-Committee who found themselves fundamentally at variance with the views of the majority were submitted simultaneously (see Parts II and III of DOC. 2761 AT/163).

7. That report and statements were first considered by the Air Transport Committee at a meeting held 31 January 1947, and consideration thereof has continued during six subsequent meetings, the last of which was held 26 February 1947. The draft Agreement submitted by the Sub-Committee underwent a few changes in the course of the discussions by the Air Transport Committee: the final version thereof is set forth as Appendix A to this Report; a Commentary on the text of the Agreement is set forth as Appendix B to this Report.

8. In the course of the discussion of the draft multilateral agreement, both in the Sub-Committee and in this Committee, numerous points have been covered, some 65 papers prepared and considered, and several matters of basic importance argued. Reference is made to the relevant minutes of the meetings of the Air Transport Committee (DOC. 2773 AT/166, DOC. 2822

AT/167, DOC. 2823 AT/168, DOC. 2867 AT/170, DOC. 2868 AT/171, DOC. 2869 AT/172, and DOC. 2871 AT/173) for the detailed discussion of the matter in that Committee. The Sub-Committee kept no formal minutes.

9. Under date of 12 February 1947, a letter was addressed to Member States renewing the suggestion made in the last paragraph of Resolution V of the First Interim Assembly that Member States furnish additional views on the subject of the Multilateral Agreement. Any information received in reply to such letter will be laid before the coming Assembly.

ESSENTIAL FEATURES OF THE PROPOSED MULTILATERAL AGREEMENT

10. The Agreement seeks to confer a regulated freedom of the air under which all States will have equal and reciprocal commercial rights. The majority of the Committee has thought that such freedom should confer the actual right to fly, without provision for supplementary arrangements as to routes. There has been general agreement that the regulation provided should be merely such as to prevent uneconomic practices and that methods of interpretation and enforcement should be sufficiently flexible to take care of the many problems (some of them not now foreseeable) that will arise. The draft Multilateral Agreement attached hereto (Appendix A) accordingly contains three essential features.

10.1 First, a grant of a general right (not confined to particular routes) to operate commercially to a reasonable number of traffic centres serving, as conveniently as is practicable, each State's international traffic;

10.2 Second, a basic regulatory provision dealing with the amount of capacity to be provided with subsidiary provisions designed to prevent abuses;

10.3 Third, a provision for the settlement of differences through arbitral tribunals with power to render binding decisions.

11. A further development of the theories underlying the various provisions of the Multilateral Agreement will be found in the Commentary (Appendix B) attached hereto.

EXTENT OF AGREEMENT AMONG COMMITTEE MEMBERS

12. The main point of difference has been whether the draft Multilateral Agreement should seek to provide a complete set of rules under which international civil air transport can be conducted without requiring, and indeed without admitting the possibility for, supplementary bilateral arrangements as regards routes and similar matters. This question has been argued from at least three standpoints:

12.1 The respective inherent merits of a "completely multilateral" as compared with a "partly bilateral" type of Agreement;

12.2 The proper interpretation to be given to the Resolutions of the First Interim Assembly as regards the type of Agreement desired; and

12.3 Which type of agreement would be more likely to find favour with a sufficient number of States to bring it generally into effect.

13. The majority of both the Committee and the Sub-Committee came to the conclusion that the Air Transport Committee should submit to the forthcoming Assembly a text which shall not admit bilateral dealings in any of its basic aspects. The majority decision is prompted by their belief that:

13.1 A so-called multilateral agreement which left room for substantial items, such as routes, to be settled by bilateral negotiation would in fact be nothing more than a revised form of standard bilateral agreement. It would be comparable to the form of bilateral agreement proposed in Resolution VIII of the Final Act of the Chicago International Civil Aviation Conference. As such, it would not represent compliance

with the duty laid upon the Air Transport Committee by the Resolutions passed by the First Interim Assembly.

13.2 If nations, each sovereign of its own territory, are left to bargain for the exchange of rights in international civil air transport in limited and varying degrees, the bargainings will be sources of conflict. Such bargainings will be in their nature discriminatory, and will involve even the possibility of an injection into the negotiations of bargaining points alien to aviation. A regulated freedom of the air under which all participating States may exercise commercial rights under rules which shall be the same for all and which shall include proper safeguards as to capacity, rates, and methods of competition is the only solution.

13.3 The foregoing beliefs have to do primarily with the inherent merits of the type of Agreement. They are thought to have influenced the Assembly in setting this Committee's task. The belief, moreover, that a completely multilateral type of agreement is best, carries with it the belief that such type of Agreement should also be most readily acceptable.

14. The minority differed from the majority with varying degrees of emphasis as regards all three aspects of the basic question set out in paragraphs 12.1, 12.2 and 12.3. It was also in disagreement with important aspects of the arguments relied upon by the majority, as expressed in paragraphs 13.1 and 13.2 above. In particular, the minority believes that the bilateral negotiation involved in their proposal would not be a source of conflict, but would lead to mutual agreement and thus obviate conflict. The general views of the minority are made clear in a separate "Statement of Minority Views" which is annexed hereto as Appendix C.

15. The Committee decided between these different points of view by adopting the following Resolution at its meeting held 13 February 1947 (DOC. 2867 AT/170, paragraph 1.1):

"The Air Transport Committee Resolves:

(a) to accept, as a basis for discussion, the draft Agreement proposed by the majority of Sub-Committee I (the Sub-Committee hereinabove referred to);

(b) to submit to the forthcoming Assembly, through the Council, the text finally adopted after discussion, which text shall not admit bilateral dealings in any of its basic aspects;

(c) to discuss and transmit to the Assembly the views of any minority concerning the draft of Multilateral Agreement finally adopted by the Air Transport Committee."

The vote was: for the Resolution—the Representatives of Brazil, Canada, Czechoslovakia, France, Netherlands, and Norway; against the Resolution—the Representatives of China, India, United Kingdom and United States; abstaining—the Representative of Ireland.

16. The remaining points of difference may be classified into points on which some Committee members felt that additional provisions were desirable and those in which there was a difference of opinion between Committee members as to the content of provisions which have been included.

16.1 The two main features as to which additional provisions were requested are as follows:

16.1.1 The Representative of Ireland put forward to the Committee additional provisions to meet particularly the viewpoint of States with a primary interest in the provision of air navigation facilities. He favoured the inclusion of a provision enabling such a State to require, on a non-discriminatory basis, airlines flying across its territory to

land at one point therein, either generally or in unique or exceptional circumstances. He considered this provision justified, particularly as the question of the relationship of the costs of air navigation facilities to the costs of international commercial air transport and the feasibility of international air transport's paying economic rates for air navigation facilities and services was still being studied. The study might well show that the investment in such facilities is greater than that in local and regional airlines. Also, policy on financial and technical aid under Chapter XV of the Convention on International Civil Aviation is only in the early stages of development, and even when such aid is fully and quickly available, it may not be as attractive to many States as would the straight-forward and more economical method of realizing an economic return from users of the facilities. The Committee felt that the suggested provision was not appropriate for inclusion in the draft Agreement but agreed that it might be put forward to the Assembly.

16.1.2 The Representative of India desired the inclusion of a provision permitting States to designate airports which would be the terminals for international air services terminating in their territories. This suggestion was rejected for the reasons appearing at paragraph 2.3.1 of Appendix B.

16.2 Provisions as to which important changes in text were desired include the following:

16.2.1 As regards the provisions of the Agreement governing capacity (Chapter III, Articles 10, 11, 12 and 13 of Appendix A), representatives of certain States preferred the language of the "Bermuda-type" agreements (see Appendix C, paragraphs 8 and 9 and suggested alternative version of Article 10). The Representative of the Netherlands desired a greater latitude for the carriage of the type of traffic referred to in Article 10 (a) (ii) of the Agreement (Appendix A). Both these suggestions were rejected in favour of the existing wording of the Agreement, which is explained at paragraph 3 of Appendix B.

16.2.2 The Representative of China desired to limit the right to carry traffic pursuant to Article 10 (a) (ii) of the Agreement (so-called "Fifth Freedom" Traffic) to traffic moving between contracting States. This was rejected for the reasons stated at paragraph 2.2 of Appendix B.

16.2.3 The Representative of Canada suggested that enforcement of the Multilateral Agreement should be left to a permanent tribunal within the Organization rather than to *ad hoc* arbitral tribunals. This was rejected for the reasons stated at paragraph 5.3 of Appendix B.

CONCLUSIONS

17. Subject to the foregoing differences, it has been possible to reach substantial agreement among members of this Committee. It must be emphasized, however, that unanimity on the part of the members of the Committee does not necessarily mean that their Governments will share such unanimity. While every effort has been made to comply with the instruction of the Assembly to develop a Multilateral Agreement which will be acceptable to Member States, many cases have been found where the only statements of national view available were those presented at the Assembly. Often, these were found to be so directly conflicting that reconciliation would be possible only by means of such general language that ambiguity, or even total absence of meaning, would result. The Committee believes that it will have made the most valuable contribution to the discussion at the next Assembly if the attached draft defines, with the greatest possible

clarity and precision, the conditions under which commercial rights would be multilaterally exchanged. Those seeking amendments will then argue from a basis of common understanding, even if not of common agreement. This object has impelled some members to accept in the draft certain provisions on which they thought their Governments would have different views, but which they feel are well in line with the basic principles accepted by the Committee.

18. At the close of its meeting held 26 February 1947, the Air Transport Committee, having concluded its extensive discussion of the Multilateral Agreement, adopted the following Resolution:

"The Air Transport Committee Resolves:

> To adopt the draft Multilateral Agreement attached as Appendix A to the Report of the Chairman (DOC. 2866 AT/169), together with the Commentary on said Agreement attached thereto as Appendix B, as the final texts for transmission to the First Assembly of ICAO in compliance with Article III, Section 6, paragraph 3 a. (4) of the Interim Agreement and Resolution V of the First Interim Assembly of PICAO."

The vote was: for the Resolution—the Representatives of Brazil, Canada, Czechoslovakia, France, Iraq, Netherlands, and Norway; against the Resolution—the Representatives of China, Ireland, the United Kingdom, and the United States; abstaining—the Representatives of Belgium and India.

19. This Report was adopted at a meeting of the Air Transport Committee held 28 February 1947.

APPENDIX A

MULTILATERAL AGREEMENT ON COMMERCIAL RIGHTS IN INTERNATIONAL CIVIL AIR TRANSPORT

WHEREAS the States which sign and ratify this Agreement, being members of the International Civil Aviation Organization formed by the Convention on International Civil Aviation drawn up at Chicago on 7 December 1944 (hereinafter called the Convention), desire to further the aims of the Convention and of said Organization;

WHEREAS the contracting States desire to affirm that a regulated freedom of the air, under which all participating States may exercise commercial rights under rules which shall be the same for all, is the only means by which the development of international civil air transport can be secured in accordance with the aims of the Convention;

WHEREAS the contracting States desire to grant to each other authorization to operate scheduled international air services over and into their respective territories and to define the terms of such authorization, all as contemplated by Article 6 of the Convention;

NOW THEREFORE, the undersigned Governments have concluded this Agreement to that end.

CHAPTER I — OTHER AERONAUTICAL AGREEMENTS AND ARRANGEMENTS

Article 1

The provisions of this Agreement shall be in addition to the provisions of the Convention as from time to time amended, and the provisions of both instruments shall be applicable to the rights and obligations of the contracting States under this Agreement. The aims of the Convention and of the International Civil Aviation Organization formed thereby are declared to be among the aims of this Agreement, and the exercise of the rights conferred by this Agreement shall be in accordance with the terms of the Convention. Expressions defined in the Convention shall have the same meaning in this Agreement.

Article 2

This Agreement supersedes all other arrangements between contracting States to the extent that such arrangements are inconsistent with its terms, and no contracting State shall enter into any such inconsistent arrangement with any other contracting State.

Article 3

No arrangement between contracting States shall be deemed inconsistent with this Agreement by reason of the fact that it confers upon the parties thereto a greater degree of freedom to operate international air services than is conferred by this Agreement, if such arrangement is open for adherence by such other contracting States as may desire to be added as parties thereto.

Article 4

No contracting State shall make any arrangement with any non-contracting State by which such contracting State receives, on a discriminatory basis, rights similar to those set forth in this Agreement, or of which the terms are otherwise inconsistent with this Agreement. A contracting State which, before the effective date of this Agreement, has undertaken any obligations toward a non-contracting State that are inconsistent with the terms of this Agreement, shall take steps to procure its release from such obligations at the earliest possible date.

Article 5

Each contracting State shall prevent its airlines from entering into any arrangement into which such State would be prevented from entering by Articles 2 and 4. If an airline of any contracting State has entered into any such arrangement, the contracting State in which it is established and any other contracting State that is a party to such arrangement shall each use its best efforts to secure forthwith the termination of such arrangement and shall, in any event, cause it to be terminated as soon as lawfully possible after the coming into force of this Agreement.

CHAPTER II — FREEDOM OF THE AIR

Article 6

Subject to the provisions of this Agreement, each contracting State shall have the right that its duly authorized airlines shall be entitled to fly their aircraft across the territory of any other contracting State without landing and to make, in such territory, stops for non-traffic purposes and for the purpose of putting down and taking on passengers, mail and cargo.

Article 7

(a) Each contracting State shall from time to time designate a reasonable number of its airports as the only ones available, under normal operating conditions, for commercial use by the airlines of the other contracting States in international air services conducted pursuant to this Agreement. Such airports shall be so located as to serve, as conveniently as is practicable, the traffic moving between the State in which they are situated and other contracting States. They shall be chosen from among those airports with characteristics meeting the requirements of the aircraft likely to make use of them in international air services, but no contracting State is required by this Article specially to build or equip any airport. So far as their physical accommodation and traffic capacity permit, and subject to compliance with Chapter III, all airports so designated shall be open for commercial use by all international air services.

(b) No contracting State shall require any international air service of

another contracting State to follow, within its territory, an unnecessarily circuitous route.

(c) No contracting State shall deny the use of its airports, insofar as their physical accommodation and traffic capacity permit, to any international air service of another contracting State in respect of stops for non-traffic purposes, if such airports are open to use by its own international air services.

(d) In exercising the power conferred by Article 68 of the Convention, contracting States shall observe the foregoing provisions of this Article.

Article 8

(a) Any contracting State desiring to exercise the rights conferred by Article 6 of this Agreement shall give four months' prior notice to each other contracting State in whose territory it intends its international air service to land and one month's prior notice to each other contracting State over whose territory it intends its air service to operate without landing, specifying:

(i) the airline authorized to operate the air service,
(ii) the entire extent of the routes over which it is intended to operate, and
(iii) all airports on such routes at which it is intended to make landings and the purpose for which the landings are to be made.

If the Government of any State receiving such notice considers that the operation of the proposed air service is inconsistent with this Agreement or the Convention, it shall, as soon as practicable, so advise the State which gave the notice. Should disagreement between the two States result, it shall be dealt with as provided in Article 17.

(b) Any change in an international air service shall be deemed to constitute a new service and to require notice accordingly if it involves either:

(i) landing for traffic purposes at an additional point or points, or
(ii) operation of the service by another airline.

(c) Each contracting State shall require its airlines to keep the interested aeronautical authorities of other States advised as to the frequency of its operations, the time-table to be followed, the types of aircraft to be used, and other relevant operating data.

(d) The giving of the notices and other information called for by the foregoing provisions of this Article is the only formality which may be required of any contracting State as a condition precedent to the exercise of the rights conferred by this Agreement.

Article 9

Each contracting State reserves the right to withhold or revoke the rights granted by this Agreement if substantial ownership and effective control of the airline concerned are not vested in nationals, or in the Government, of the contracting State or States in which the airline is established.

CHAPTER III — CAPACITY

Article 10

(a) The amount of capacity which a contracting State shall be entitled to permit any of its airlines to provide from time to time over various stages of each route shall be that required for the carriage, at a reasonable load factor of both:

(i) passengers, mail and cargo taken on or to be put down by such airline in the territory of such State; and
(ii) passengers, mail and cargo moving by such airline between points in the territories of other States which the route touches, insofar

as capacity for such traffic is not being provided by airlines of the States in which such traffic is taken on or put down.

(b) For the purpose of determining where any passenger has been taken on and where such passenger is to be put down, within the meaning of paragraph (a) of this Article and of Article 7 of the Convention, stopover or other break in the transportation will be disregarded if, according to the contract made between the passenger and the airline, there is to be but a single transportation.

Article 11

Any contracting State may permit its airlines reasonable discretion as regards the amount of capacity to be offered on the initiation of new international air services.

Article 12

Article 10 shall not be interpreted to require changes in capacity more frequently nor at a larger number of points along a route than is consistent with sound operating practices of through international air services.

Article 13

Nothing in this Agreement shall prevent unfilled capacity in any aircraft operated under this Agreement from being used for the carriage of any passengers, mail and cargo offered.

CHAPTER IV — RATES, SUBSIDIES AND UNFAIR PRACTICES

Article 14

Each contracting State shall require that its airlines charge reasonable rates. Such rates may be set by airlines or by the respective contracting States in which they are established. If any contracting State considers rates charged by an airline of another contracting State to be unreasonable and injurious to it, and if a disagreement results, such disagreement shall be dealt with as provided in Article 17.

Article 15

Each contracting State shall refrain from granting to airlines any form of assistance which fosters competitive practices destructive to other airlines.

Article 16

Each contracting State shall prevent its airlines from engaging in unfair competitive practices and from participating in any arrangements which result in defeating the aims of this Agreement.

CHAPTER V — DISAGREEMENTS

Article 17

(a) Any disagreement arising between contracting States on the interpretation or application of this Agreement, which cannot be settled by negotiation, shall be resolved by an arbitral tribunal, the members of which shall be appointed by the President of the Council of the International Civil Aviation Organization. The method of selecting members of such arbitral tribunal and the conduct of their proceedings shall be governed by rules as established by the Council.

(b) If, upon the application of any contracting State as to a matter covered by Article 8 or Article 14 of this Agreement, the President of the Council of the International Civil Aviation Organization, on evidence submitted, shall be of the opinion that a temporary restraining order is required, he may issue such order. The order of the President shall remain in effect until the decision of the arbitral tribunal comes into force, unless sooner modified or revoked by him.

(c) Contracting States shall conform to decisions of such tribunal and orders of the President, and shall require their airlines to conform thereto. If an airline of any contracting State fails to conform to any such decision or order, each other contracting State undertakes not to allow the operation of such airline through the airspace above its territory until such time as the airline is acting in conformity to such decision or order.

CHAPTER VI — RATIFICATION, COMING INTO FORCE, ADHERENCE, TERMINATION AND DENUNCIATION, AMENDMENT, AUTHENTICITY OF TEXTS

Article 18

This Agreement shall be subject to ratification by the signatory States. The instruments of ratification shall be deposited with the Secretary General of the International Civil Aviation Organization.

Article 19

This Agreement shall be open for adherence by all States which have ratified or adhered to the Convention. Adherence shall be effected by notification of adherence addressed to the Secretary General of the International Civil Aviation Organization and shall take effect on the thirtieth day after the receipt of the notification by the Secretary General.

Article 20

Three months after there have been deposited instruments of ratification or adherence by contracting States, not less than 20 in number, among which there is currently apportioned an aggregate of not less than 60 percent of the expenses of the International Civil Aviation Organization as determined by its Assembly for the fiscal year current on the date of the final deposit, this Agreement shall come into force as between the contracting States.

Article 21

(a) Contracting States may give notice of their denunciation of this Agreement, not less than one year after its coming into force, to the Secretary General of the International Civil Aviation Organization. Such denunciation shall take effect one year from the date of the receipt of the notification.

(b) Prior to the deposit of the instrument of ratification or adherence which causes this Agreement to come into effect, as provided in Article 20, any State which has deposited any instrument of ratification or adherence may withdraw the same. Withdrawal shall be effected by written notice addressed to the Secretary General of the International Civil Aviation Organization, and any instrument withdrawn shall, for the purpose of the computation called for by Article 20, be deemed not to have been deposited.

Article 22

The Secretary General of the International Civil Aviation Organization shall give notice to each of the Governments which have signed and to the Governments of each of the States which have ratified or adhered to this Agreement of the date of deposit or withdrawal of each instrument of ratification or adherence, of the date on which this Agreement comes into force, and of the receipt of each notice of denunciation of this Agreement.

Article 23

(a) The Council of the International Civil Aviation Organization may, and upon the request of ten or more contracting States shall, call a meeting of all contracting States at an appropriate time and place for the purpose of considering any proposed amendment or amendments to this Agreement. Any proposed amendment approved by a two-thirds vote of such meeting shall come into force in respect of States which have ratified such amend-

ment when ratified by the number of contracting States specified by such meeting. The number so specified shall not be less than two-thirds of the total number of the contracting States hereunder.

(b) If, in the opinion of the meeting, an amendment is of such a nature as to justify this course, the meeting in its Resolution recommending adoption may provide that any State which has not ratified such amendment within a specified period after the amendment has come into force shall thereupon cease to be a party to this Agreement. In such case, any contracting State which has failed to ratify within the period specified shall automatically cease to be a party to this Agreement.

Article 24

This Agreement shall be open for signature during a period of fifteen months from .... May 1947. It is drawn up in the English, French and Spanish languages, and each of these texts shall be of equal authenticity. The English, French and Spanish texts shall be deposited in the archives of the International Civil Aviation Organization. Certified copies of this Agreement shall be transmitted by the Secretary General of the International Civil Aviation Organization to all contracting States which sign, ratify or adhere to this Agreement.

Signature of Agreement

In witness whereof, the undersigned plenipotentiaries, having been duly authorized, sign this Agreement on behalf of their respective Governments on the dates appearing opposite their signatures.

Done and opened for signature at Montreal, the .... day of May, 1947.

Signature	*State on behalf of which signed*	*Date*

APPENDIX B

COMMENTARY OF AIR TRANSPORT COMMITTEE ON MULTILATERAL AGREEMENT ON COMMERCIAL RIGHTS IN INTERNATIONAL CIVIL AIR TRANSPORT

COMMENTARY ON GENERAL MATTERS, PREAMBLE, AND CHAPTER I

1. The first problem in preparing a Multilateral Agreement has been to fit it into the existing pattern of national laws and international aviation arrangements.

1.1. In order to accomplish its objective by overriding inconsistent national legislation, the Agreement must be expressed as a treaty. For this reason signature, ratification and adherence are provided for along the same lines as in the case of the Convention on International Civil Aviation (Preamble and Articles 18 and 19).

1.2 Reconciliation of the Multilateral Agreement with the Convention is accomplished by Article 1 of the Agreement, which makes the provisions of both instruments applicable to the rights and obligations of the contracting States under the Multilateral Agreement. Neither document is specifically referred to as controlling, since all inconsistencies between the two are believed covered by references in the Agreement to provisions of the Convention (See Preamble, Articles 7(d) and 10(b)). If any inconsistencies are discovered subsequently, ordinary principles of legal construction should suffice to reconcile them.

1.3. Article 3 has been inserted to permit States that so desire to make even more liberal arrangements for the conduct of international air services than are provided by the Agreement, provided that such arrangements are open to all contracting States on a non-discriminatory basis.

1.4 Articles 2 and 3 will determine the relation of the Multilateral Agreement to the International Air Services Transit Agreement and the International Air Transport Agreement.

1.5 In forbidding contracting States to make discriminatory arrangements with non-contracting States, Article 4 prevents one contracting State from securing special concessions from a non-contracting State and thus gaining an advantage over other contracting States.

1.6 Articles 4 and 5 require States to disengage themselves and their airlines from all obligations that are inconsistent with this Agreement, since otherwise the object of the Agreement to secure generally the exercise of commercial rights under rules which shall be the same for all (See Preamble) might be defeated.

COMMENTARY ON CHAPTER II

2. This Chapter contains the basic grant of rights under the Agreement.

2.1 Article 6 of this Chapter confers the rights formerly known as the "Five Freedoms of the Air" in greatly simplified form. Simplification was deemed desirable since the former language was felt not to be understood by the world at large. The Multilateral Agreement will be laid before the public and before various public officials for discussion and adoption, and perhaps before tribunals for interpretation and enforcement. The advantages of restating the concepts that had become crystallized in the somewhat artificial phraseology of the Five Freedoms in such a way as to be readily understandable to the world at large seem clearly to outweigh the advantages of continuing the traditional phraseology.

2.2 The present Agreement, moreover, is more liberal than previous versions in that the right to carry traffic between two points, neither of which is in the territory of the State in which the airline is established (the traffic formerly known as "Fifth Freedom Traffic"), is no longer restricted to cases where both points are in contracting States. No danger is perceived in thus permitting one contracting State to carry traffic across another contracting State to a non-contracting State, so long as Article 4 prevents the first State from using this as the basis for obtaining a discriminatory concession from the non-contracting State.

2.3 The right to fly conferred by the Agreement is not confined to particular routes, but is a general right, available to any airline which has been duly authorized by its own government. Hence, the question immediately arises whether landings are permitted at each and every airport of each and every country or whether some degree of restriction is necessary. The solution proposed in the Agreement (Article 7) is to require the designation of a reasonable number of international airports in each country which will be available for use by all international airlines whose traffic justifies operation thereto.

2.3.1 The Committee considered a suggestion that contracting States might be given the right to nominate the terminal points of international air services terminating within their territories. This would permit the State concerned to designate a terminal point near the border of entry, thus assuring to its internal air services the onward carriage of the traffic to its point of destination. The suggestion was rejected because the Committee felt that air transport, being the only form of transport which can pass over natural boundaries such as sea coasts, should not be confined by artificial limitations.

2.4 The remaining provisions of the Article concern themselves primarily with avoidance of discrimination by any country against foreign airlines. This is the basic reason for requiring convenience of

location of airports, selection of airports with proper characteristics, and limitations on the exercise of the power to designate routes and airports conferred by Article 68 of the Convention. On the other hand, it is realized that foreign airlines can have no overriding right to enter airports which already may be crowded to capacity, so that the right to use a designated airport is made dependent on its physical accommodation and the traffic it can handle.

2.5 In the interests of good order, and also to permit timely objection by States which regard a contemplated operation as inconsistent with the Agreement, Article 8 provides for the giving of notice of intention to operate. The giving of such notice obviates the nuisance of having to "qualify before the competent aeronautical authorities" of another State before commencing operations.

2.6 Article 9 recognizes the right of Governments to be assured that foreign airlines entering their territory are actually owned and controlled in accordance with their apparent nationality. The reservation of this right does not necessarily mean that it will be used in all or even in many cases.

COMMENTARY ON CHAPTER III — CAPACITY

3. This Chapter contains the basic regulatory provisions of the Agreement. The Articles of this Chapter (Articles 10, 11, 12 and 13) must not be considered separately, but are completely interdependent.

3.1 By means of capacity limitation it is sought:

3.1.1 to eliminate destructive competition in the form of excessive capacity offerings, and

3.1.2 to remove the necessity for designating routes.

3.2 Article 10 names two factors on which capacity to be operated shall be based. The calculation cannot be exact because it is made with reference to a "reasonable load factor," which is a term permitting flexibility according to the type of operation (see paragraph 3.8 *infra*). The following distinctions between the two elements on which capacity entitlement is based should be kept in mind:

3.2.1 The first element, namely, traffic taken on and to be put down in the State's own territory (formerly known as "Third and Fourth Freedom Traffic") is the fundamental element. In most cases it will quantitatively far outweigh the second element. More important, however, is the fact that the right to provide the capacity required for one's own traffic is recognized as inherent and not subject to reduction so long as the load factor remains reasonable.

3.2.2 The second element, namely, traffic between other States along the route (formerly known as "Fifth Freedom Traffic") is supplementary. Moreover, the right to provide capacity for this purpose is not inherent, but exists only so long as the airlines of the other States concerned cannot accommodate such traffic. Such additional capacity would have to be reduced or eliminated when one of such countries not previously active in international air transport enters the field.

3.3 If we concentrate in the first place on the basic element of capacity, we find that it is not necessary to fix the route pattern in terms of reasonably direct routes out from and back to the territory of the State in question, for the traffic flow itself should normally eliminate unnecessary meanderings.

3.3.1 The so-called "Sixth Freedom" problem — namely that created by a State not itself producing substantial traffic but situated on a reasonably direct route between two States which have a substantial traffic flow between them — also is solved. The intermediate State would be prevented by the basic capacity limitation from adding ca-

pacity for the carriage of traffic directly between the other two States, except to the limited extent possible under the second element of capacity entitlement. If it resorted to the device of selling two tickets (one from the first State to itself and the second onward to the Second State) this should be regarded as an unfair practice.

3.4 The limitations on capacity are expressed in terms of what each particular airline may be permitted to provide, but no attempt is made to apportion the traffic moving between any two States among their respective airlines. If we take, for simplicity of illustration, two States, each operating only one airline between it and the other State, these airlines are left free to compete for all the traffic between the two States. If the airline of one State obtains more of the traffic than that of the other, it may put on more capacity. If the airline of the other State thereupon finds its load factor reduced to a point where it is no longer reasonable, a reduction in capacity on the part of the latter may be required.

3.5 The required relation between traffic and capacity is determined with respect to various stages of each route, since it has no relevance if considered for a State as a whole and only slight relevance if considered for all stages of any given route in the aggregate. As the airlines of a given State get further and further from their own territories, the amount of capacity which they will need in order to operate will normally decrease as the traffic disembarks along the route. Corresponding reduction of capacity can be accomplished by decreasing the number of schedules, or by changing to smaller aircraft, or both.

3.6 How often changes in capacity will have to be made will depend on circumstances. As regards time of change, a certain period would have to elapse to permit traffic to be developed; in the case of a new route or a significant change of equipment, a trial period of considerable length might be deemed reasonable before adjustments are required. As regards place of change, it is contemplated that changes will not have to take place at each point on a route where a relatively small change of traffic volume is encountered. Major traffic centres at which there is enough interchange of traffic to create a really substantial difference in the character of the flow should be selected as points for changing capacity.

3.7 The purpose of Articles 11 and 12 is to soften the rigidity of Article 10 to the extent necessary to permit airlines to operate efficiently.

3.8 The entire provision on limitation of capacity contemplates a "reasonable load factor." The reasonableness of the load factor on the various stages of the route will depend on a number of elements: for instance, since the length of the stages is not constant, the same load will produce a higher factor on some portions of the route than on others; similarly, a flow of traffic predominantly in one direction would affect the apparent load factor.

3.9 The point at which traffic is deemed to have embarked will be of considerable importance in gauging capacity where "stop-over" traffic is involved. The Committee has considered whether it is practicable to formulate rules to determine when a passenger, who has stopped over en route, should be considered as having lost the character of his original embarkation. Establishment of a formula did not appear practicable, and accordingly the contract of carriage is made controlling even to the extent of permitting what might otherwise be considered as cabotage under Article 7 of the Convention.

3.10 The manner in which the capacity authorized may be used has also been considered by the Committee. The solution reached (Article 13) was that there shall be no roped off seats of other unfilled capacity

resulting from the Agreement. If operation of excessive capacity is encountered, the remedy is believed to be reduction of the number of, or size of, the aircraft flown, or both, and not a restriction of the use to which those that are flown may be put. Anything an airline is permitted to fly according to the Agreement it is permitted to fill with international traffic.

COMMENTARY ON CHAPTER IV — RATES, SUBSIDIES, AND UNFAIR PRACTICES

4. These may be considered as supplementary regulatory provisions. Emphasis has been placed on generality and flexibility as distinct from enumeration of specific points. Thus, no attempt is made to enumerate the factors entering into the reasonableness of rates, and enumeration of specific unfair practices has been avoided. It is felt that the arbitral tribunals provided for in Chapter V, if properly chosen, can far more adequately deal with specific questions as they arise than could precise contractual provisions established in advance.

COMMENTARY ON CHAPTER V — DISAGREEMENTS

5. The need for some effective agency to interpret and enforce the Agreement is obvious in view of its deliberate generality and flexibility. Such interpretation is best left to a proper tribunal; enforcement is achieved through adequate sanctions for the decisions of the tribunal.

5.1 Four main alternative methods of dealing with disagreements were considered as follows:

5.1.1 To give the Council of ICAO power to render binding decisions in somewhat the same manner as is now provided by Chapter XVIII of the Convention.

5.1.2 To give the Council merely advisory powers of decision.

5.1.3 To provide for arbitral tribunals with bind powers.

5.1.4 To provide for a permanent tribunal within ICAO.

5.2 The first alternative was rejected because of the belief that the Council, while well suited to serve as a legislative body is, by its very nature, improperly suited to be competent as a judicial body. It is a Council of States. The individuals who serve as representatives on the Council are necessarily subject to instructions in casting the votes of their respective States. Accordingly, the final vote on a judicial question pending in the Council might easily be merely a summing up of the political forces currently operating in the twenty-one States represented. It seems unlikely that the Council will be any more able than a national legislative body to establish a clear line of precedents, to follow precedents once established, or to act generally in a judicial manner.

5.3 Although there was some support for the appointment of a permanent tribunal within the Organization this was deemed inadvisable because of the expense involved and the unpredictable volume of litigation. In this connection it was recalled that, although several bilateral agreements provide for application to the Council of PICAO for advisory report in case of dispute, no such applications have as yet been made.

5.4 To give the Council advisory powers only was deemed to combine several of the objections to the Council's acting at all in a judicial capacity, with a further objection that the Council's decision once rendered would not be enforceable.

5.5 Appointment of a tribunal with power to render binding decisions was deemed necessary, since it seemed unlikely that any State would grant the rights conferred by the Agreement without more protection than an advisory decision. The objections above recited to the use of

existing or contemplated permanent agencies did not seem to apply to *ad hoc* arbitral tribunals. Appointment of such tribunals with binding powers was accordingly deemed the best solution. By providing that all members of the tribunal are selected by the President of the Council, the objection is avoided that arbitral tribunals often consist of two advocates (the nominees of the respective parties) and one judge (the third member selected by the other two). The provision of a power in the President of the Interim Council to make temporary restraining orders was deemed a necessary complement in view of the inevitable delays in convening a special tribunal and trying a controversy before it.

5.6 It will be observed that, although Article 17 (c) requires contracting States to conform to decisions and orders, the sanctions provided apply only to airlines of contracting States which fail to conform thereto. The Committee believed that it was preferable, on the whole, to rely on the undertaking of States to abide by the decisions without seeking to impose sanctions against the States themselves in case of violation.

COMMENTARY ON CHAPTER VI — RATIFICATION, COMING INTO FORCE, ADHERENCE, TERMINATION AND DENUNCIATION, AMENDMENTS, AUTHENTICITY OF TEXTS

6. Only two provisions of this Chapter seem to require specific mention.

6.1 Article 20 is based on the theory that the Agreement should not become effective until enough States have become parties to it to assure that a large share of the world's international air transport is included. This is true especially since rights under inconsistent arrangements may be lost under the provisions of Chapter I. It seemed best that the coming into effect of the Agreement should depend on two factors, namely a sufficient number of States (twenty) and a sufficient representation of aeronautical interest (sixty percent as measured by current ICAO contributions).

6.2 Article 23 permits amendments to the Agreement along generally the same lines as provided for amendments to the Convention. Since, however, the contracting States under the Multilateral Agreement lack a controlling body, such as the Assembly, it was necessary to provide for special meetings of the contracting States to pass upon proposed amendments. No doubt the occasion of the ICAO Assembly can, where desirable, be made to determine the time and place for the meeting of the contracting States under the Multilateral Agreement, all of whom will be members of ICAO.

APPENDIX C

STATEMENT OF MINORITY VIEWS OF AIR TRANSPORT COMMITTEE ON MULTILATERAL AGREEMENT ON COMMERCIAL RIGHTS IN INTERNATIONAL CIVIL AIR TRANSPORT

(Presented by Sir James Cotton, Mr. P. T. David and Mr. T. Y. Yang)

1. The views of the above-named members of the Air Transport Committee concerning the draft Multilateral Agreement which has now been adopted by the Committee are as follows:

2. We consider it an ably drawn document to provide for the exercise of commercial rights in international civil air transport by Member States without recourse to bilateral arrangements.

3. The draft was also intended to result in a situation under which a single set of principles would be applied to the regulation of commercial air rights throughout a large part of the world; but this objective seems to have been lost sight of when Article 3 was included. Under that Article a variety

of arrangements based on different principles could be brought into operation. This would not seem desirable, and we would prefer to see Article 3 omitted.

4. We believe it is practicable to lay down a multilateral code of principles, which afford fair and equal opportunity for the development of international air transport. But for a State to be authorized to specify what it individually regards as a sealed pattern for the operation of a route in accordance with the code, without consultation with any other State affected, would inevitably lead to friction and disputation. In our view, it is more practicable at this stage to lay down certain uniform principles which all States would agree to observe in settling routes, which principles must be so drawn that in practice they may be capable of meeting the needs of differing circumstances. Therefore, we consider that route arrangements must continue to be subject to bilateral negotiation within the framework and in accordance with the principles of a multilateral agreement.

5. In the present stage of development of international civil aviation, and because a number of States, although they may wish to do so in the future, are unable now to provide the amount of capacity to which the Agreement would entitle them, the implementation of an agreement based on the draft would, in our opinion,

(a) cause much friction between States in attempting to exercise their rights under the Agreement thus giving rise to an excessive amount of international litigation,

(b) permit the uneconomic duplication of existing services between pairs of States having substantial amounts of air traffic between themselves,

(c) tend to deprive States at present unable to take their proper part in international civil aviation of the possibility of safe-guarding their future interest.

6. For these reasons, we believe the draft Multilateral Agreement which has been adopted by the majority of the Air Transport Committee would not be ratified by a sufficient number of Member States to come into effect.

7. We consider that if a Multilateral Agreement were brought into operation laying down principles which contracting States would undertake to follow in the exchange and operation of routes agreed to bilaterally, it would be a considerable advance from the present system of unregulated bilateralism.

8. We also consider that a Multilateral Agreement for the regulation of bilateral arrangements in accordance with principles similar to those on which Bermuda-type agreements have been based, would be more readily attainable than a Multilateral Agreement which excludes bilateral arrangements.

9. Therefore, we would favour consideration by the Assembly of the possibility of advancing the solution of the problem of the regulation of commercial rights in international civil air traffic by means of such a Multilateral Agreement as is indicated in the preceding paragraph. To this end we would submit the alternative draft Articles 7, 8 and 10 attached hereto as a preferable basis for discussion in the Assembly.

PROPOSED SUBSTITUTE ARTICLES

Article 7

(a) The right of any contracting State under this Agreement to land aircraft in the territory of any other contracting State for the purpose of putting down and taking on passengers, mail and cargo shall be given effect through separate arrangements to be made between the competent aeronautical authorities of such States concerning the routes to be flown

between and beyond their respective territories, and the airports of entry and points to be served in their respective territories.

(b) In designating routes to be followed and airports to be used, pursuant to this Agreement and to Article 68 of the Convention, the following principles shall be observed:

(i) Each route shall constitute as nearly a direct course out from and back to the territory of the State whose nationality the aircraft possesses as may be consistent with the requirements of the traffic originating and terminating in such State.

(ii) There shall be a fair and equal opportunity for the carriers of the respective States to operate air services on the agreed routes between their respective territories.

(iii) No contracting State shall decline an exchange of routes with any other contracting State on any grounds other than an insufficiency of traffic to justify the proposed operations, or otherwise discriminate unfairly against any such State.

(iv) No contracting State shall unfairly deny to any airline of another contracting State the use for non-traffic purposes of airports open to use by its own international airlines, or require any airline of another contracting State to follow, within its territory, an unnecessarily circuitous route.

Article 8

Each party to any implementing arrangements contemplated by Article 7 shall designate the airline or airlines which will operate the route or routes accorded it by such arrangements, and shall give notice of such designation to the other party or parties thereto. Such designations may be changed from time to time, and like notice shall be given upon each such change.

Article 10

(a) The services provided by any airline of a contracting State over any air route arranged under this Agreement shall bear a close relationship to the requirements of the public for such transport and shall have as their primary objective the provision at a reasonable load factor of capacity adequate to the current and reasonably anticipated requirements for the carriage of passengers, mail and cargo taken on or to be put down in the territory of such State.

(b) Provision for the carriage of passengers, mail and cargo moving between points in the territories of other States which any such route touches shall be made in accordance with the general principles that capacity shall be related to:

(i) Traffic requirements between the country whose nationality the airline possesses and the countries of destination of the traffic;

(ii) Requirements of through airline operation for fill-up traffic; and

(iii) Traffic requirements of the area through which the airline passes after taking account of other air transport services established by airlines of the States concerned.

(c) For the purpose of determining where any passenger has been taken on and where such passenger is to be put down, within the meaning of this Article and of Article 7 of the Convention, stop-over or other break in the transportation shall be disregarded if, according to the contract made between the passenger and the airline, there is to be but a single transportation.